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In the

Supreme Court of the United States

OCTOBER TERM, 1959

No. 870.60

PAUL POE ET AL., JANE DOE
Appellants

vs.

ABRAHAM S. ULLMAN, *State's Attorney,*
Appellee

ON APPEAL FROM THE SUPREME COURT
OF ERRORS OF CONNECTICUT

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellants Doe and Poes appeal from the judgments of the Supreme Court of Errors of Connecticut entered on December 8th, 1959, dismissing their appeal from the Superior Court of New Haven and affirming the judgment of said Superior Court sustaining appellee's demurrer to appellants' action and dismissing appellants' complaint. Appellants submit this statement to demon-

strate that the Supreme Court of the United States has jurisdiction of these appeals and that substantial federal questions are presented.

OPINION BELOW

The opinion of the Supreme Court of Errors of Connecticut rendered December 8th, 1959, is reported in 147 Conn. 48, 156 A. 2d 508.

The opinion of the Supreme Court of Errors of Connecticut is set forth in the Appendix to this Statement.

JURISDICTION

These appellants filed their writs and complaints in the Superior Court of New Haven County, Connecticut, on May 22, 1958, pursuant to Section 52-29 General Statutes of Connecticut, Revision of 1958. The complaints sought a declaratory judgment that Sections 54-196 and 53-32 of the General Statutes of Connecticut, Revision of 1958, are unconstitutional on their face or as applied to them.

Appellee Ullman filed a demurrer to each of said complaints which was sustained by the Superior Court of New Haven County, Connecticut, in a memorandum decision filed January 5, 1959. Thereafter a motion for judgment after demurrer dismissing each of said actions was sustained by said court in a ruling entered on January 21, 1959.

Appellants thereupon filed their appeal to the Supreme Court of Errors of Connecticut on February 11, 1959. Thereafter on December 8th, the Supreme Court of Errors of Connecticut affirmed the judgment of the Superior Court.

Notices of appeal to the Supreme Court of the United States were filed with the Supreme Court of Errors of Connecticut on February 19th, 1960.

Each of these causes presents a justiciable issue. The conditions which establish the validity of the declaratory procedure were recently set forth by this Court in *Evers* vs. *Dwyer*, 358 U.S. 202. These cases meet the test. All appellants have standing to sue since their vital interests are involved. Their liberty, their lives and their health are involved.

There is a real and substantial controversy presented in each case. Appellants require and seek medical advice with respect to contraceptive devices and their use which they intend to employ to preserve their lives and their physicial and emotional health. They are unable to obtain such advice and to use such contraceptive devices and instruments for the sole reason that appellee claims that both the giving of such advice and treatment by their physician as well as the use of such instruments and devices are offenses under Sections 53-32 and 54-196 General Statutes of Connecticut, Revision of 1958, and that he will prosecute (as indeed he has heretofore prosecuted in *State* vs. *Nelson*, 126 Conn. 412) any violation of said statutes. Appellants claim and appellee denies that the said statutes, on their face and as applied to them, violate the Fourteenth Amendment to the Constitution of the United States. Each question was raised and passed upon by the state court.

The questions raised here are not hypothetical nor are they contingent. What these appellants desire and propose to do in order to protect their lives, health and marital happiness is not speculative. It is definite and is clearly in violation of the challenged statutes. Nor is the threat to them vague or conditional. It is actual, specific and immediate—not fanciful, general or remote. The appellee has previously prosecuted such volations and

declares that he will prosecute further violations. "Definite rights" appear on the one side and "definite prejudicial interferences" on the other. Appellants do not seek an advisory opinion. As to them, the controversy is all too real. Certainly the facts alleged and admitted "show that there is a substantial controversy between the parties having adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Ewers* vs. *Dwyer, supra* at 203, quoting from *Maryland Casualty Co.* vs. *Pacific Coal and Oil Co.*, 312 U. S. 270, 273.

Appellants, while obviously bringing their actions under fictitious names are not fictitious persons. With the exception of names, they are accurately described in their complaints. Counsel has in his possession affidavits from each of these appellants identifying themselves with these pseudonyms and authorizing the present actions under them. The court below was convinced of the reality of these appellants and so noted in its opinion.

All appellants are entitled to have these important constitutional questions settled insofar as their claimed rights are concerned and one of the purposes of the declaratory judgment procedure is to afford a method for such determination without subjecting them to the risk of fine or imprisonment or both. Borchard, *Challenging Penal Statutes by Declaratory Actions*, 52 *Yale L. J.* 445.

The jurisdiction of the Supreme Court of the United States to review the judgment of the Supreme Court of Errors of Connecticut on appeal is conferred by Title 28, United States Code, Section 1257(2). The following decisions sustain the jurisdiction of the Supreme Court to review the judgments on appeal in this case. *Nashville C. & St. L., R. Co.* vs. *Wallace*, 288 U. S. 249; *Ewers* vs. *Dwyer, supra* at 202; *Butler* vs. *Michigan*, 352 U. S. 380.

QUESTIONS PRESENTED

Whether Section 53-32, the general accessory statute and Section 54-196 of the General Statutes of Connecticut which makes it a criminal offense for any person to "use any drug, medicinal article or instrument for the purpose of preventing conception" are unconstitutional on their face or, as applied to appellants, in that they deprive them generally of life, and liberty without due process of law contrary to the 14th Amendment of the Constitution of the United States and particularly in that said statutes subject them to serious risk of loss of liberty, life and health by reason of future pregnancies.

STATUTES INVOLVED

Statutes involved in this case are Sections 53-32 and 54-196, General Statutes of Connecticut, Revision of 1958:

Section 53-32, General Statutes of Connecticut, Revision of 1958:

> "Use of drugs or instruments to prevent conception. Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or both fined and imprisoned."

Section 54-196, General Statutes of Connecticut, Revision of 1958:

> "Accessories. Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender."

STATEMENT OF THE CASES

Appellant Jane Doe is a housewife who has continuously resided with her husband in New Haven since their marriage in 1954. She is 25 years old and has no living children.

Mrs. Doe was admitted to the obstetrical services of the Grace-New Haven Hospital in January, 1957, with the diagnosis of hypertensive cardio-vascular disease, toxemia of pregnancy Cushing's syndrome. It was determined by physicians in authority to terminate her pregnancy because of her condition. However, on January 28, 1957, before this procedure could be carried out, Mrs. Doe developed a cerebral hemorrhage which produced a partial paralysis. She was completely unconscious for two weeks and acutely ill for nine weeks during which time it was necessary to apply several life saving procedures. The plan to terminate her pregnancy was abandoned and on June 19, 1957, she spontaneously delivered a still born fetus. Mrs. Doe was dismissed from the hospital with the same heart condition, severe paralysis of the right leg, total paralysis of the right arm, residual kidney damage, marked impairment of speech and serious emotional instability.

It is the opinion of appellant's physician, Dr. C. Lee Buxton, that another pregnancy would be exceedingly perilous to life.

The appellant needs and requires and has asked her physician for medical advice to prevent further pregnancies. It is the opinion of said physician that the best and safest medical treatment would be to inform her as to methods of preventing conception by the use of medical articles and instruments. Appellant has been unable to obtain such advice and to use such medical instruments for the sole reason that the appellee, State's Attorney, claims that the giving of such information and the use of such instruments are prohibited by Sections 53-32 and 54-196 of the General

Statutes of Connecticut, Revision of 1958 and that he will prosecute any violation of such statutes.

Appellant Doe claims that said statutes are unconstitutional on their face and, as applied to her in her condition of health, deprive her of constitutional rights under the due process clause of the 14th Amendment to the Constitution of the United States and in her complaint she asked the state court so to declare. Appellee, State's Attorney, demurred to appellant's complaint thereby admitting all of the aforesaid facts as alleged in appellant's complaint. The demurrer was sustained. After final judgment for appellee dismissing the action, and affirmance by the Supreme Court of Errors of Connecticut, appellant appeals to this Court and prays that the judgment of the Connecticut courts be reversed and that the statutes in question be declared unconstitutional.

Appellants Paul and Pauline Poe are husband and wife who live together in New Haven. Mr. Poe is a businessman and Mrs. Poe is a housewife. She is 26 years old; he is 30. They have no living children.

Mrs. Poe has had three consecutive pregnancies, each of which has terminated in the delivery of an infant with multiple congenital abnormalities inconsistent with life. The first infant was delivered in January, 1954 with congenital heart disease and kidney abnormality. It died on the 9th day of life. The second child was born in April, 1955, and was a Mongoloid with associated renal and cardiac lesions. It expired within six days. The third child was born in October, 1957, with evidence of cerebral and gastro-intestinal maldevelopment. It perished within ten weeks. It is the opinion of appellant Buxton that even if these children had survived it is highly unlikely that any of them would have had a normal life. The cause of these abnormalities is thought by their physician and other specialists to be genetic but they have been unable to make a successful prognosis and treatment.

Appellants have already suffered great emotional distress as a result of these successive tragedies and another pregnancy would be extremely disturbing to their physical and mental health.

In other respects, the case of these appellants is similar to that of appellant Doe.

THE QUESTIONS ARE SUBSTANTIAL

These cases raise fundamental questions of life and personal liberty never passed upon by this Court. Cf. *Tileston* vs. *Ullman*, 318 U. S. 44. The challenged statutes purport to regulate the behavior of married persons in the privacy of their homes in an arbitrary manner which restricts their liberty and seriously jeopardizes the lives and health of spouses, their happiness, the solidarity of the family and the future welfare of their children. Again the statutes fly in the face of medical science and prohibit, restrict and regulate the proper and approved practice of medicine in the field of gynecology and obstetrics.

POINT I

Sections 53-32 and 54-196, General Statutes of Connecticut, Revision of 1958, involve one of the basic civil or human rights of man.

The right to marry and establish a home, recognized in *Meyer* vs. *Nebraska*, 262 U. S. 390, 399, necessarily implies the right to engage in normal marital relations. And the right to engage in such relations embodies a personal freedom or privilege to procreate or not procreate as the individuals may desire or as medical factors may dictate. This right must therefore be considered as one of the bundle of rights which are "fundamental to the very existence and survival of the race" particularly when considered in the context of serious threats to life itself. See *Skinner* vs. *Oklahoma*, 316 U. S. 535, 541.

Like the right "to marry, establish a home and bring up children," this freedom to engage in marital relations as the spouses see fit "may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect." *Meyer* vs. *Nebraska, supra* at 399-400. Just as there are limits to the extent to which a legislatively represented majority may conduct biological experiments at the expense of the dignity and personality and natural powers of individuals (see Jackson, J., concurring in *Skinner* vs. *Oklahoma, supra* at 546), so too there are limits to which the Connecticut legislature may impinge upon or conduct experiments with the dignity, powers and freedoms of married individuals in their most intimate relationships.

Such limits are exceeded where the legislative mandate compels the spouses to make an unreasonable or irrational choice in conducting their marital relations. Connecticut has here imposed just such a choice. It has said that the appellants may choose between one of two alternatives only: (1) they may engage in marital relations without the use of contraceptives but at grave risks to life and health of the wives and possible children, or (2) they may abstain completely from such relations and thus, as will be shown in Point IV, forego or frustrate a fundamental of the marriage state. Legislation which leaves total abstention as the only alternative to death or impaired health is on its face arbitrary and unreasonable. It imposes on the individuals involved an illusory choice "between the rock and the whirlpool—an option to forego a privilege which may be vital to his livelihood [or to married life, in this case], or to submit to a requirement which may constitute an intolerable burden [intolerable here to health and life itself]." *Frost* vs. *Railroad Commission*, 271 U. S. 583, 593.

This Court has recognized that a statute which imposes a police regulation on an individual at the expense of impaired health or possible death would be "cruel and inhuman in the last degree" and obviously unconstitutional. *Jacobson* vs. *Massachusetts*, 197 U. S. 11, 38-39. When such an illegal exaction is combined with an alternative of refraining from an act so vital to the maintenance of a healthy marriage, the result is an unreasonable and arbitrary intrusion into the private affairs of the citizens of Connecticut. And it is an intrusion that is nowhere justified by the legislature on grounds of public health, morality or medical desirability. Such legislation cannot stand by virtue of the due process clause of the Fourteenth Amendment.

POINT II

Sections 53-32 and 54-196, General Statutes of Connecticut, Revision of 1958 are unconstitutional on their face and particularly as applied to all these appellants because they are not reasonably related to the evil which they are intended to abate.

There are no legislative findings with respect to the conditions which gave rise to the enactment of Section 53-32 nor as to the purpose thereof. See *Talley* vs. *California*, March 7, 1960, 28 Law Week 4186. Actually the statute was enacted in 1879 as a part of a general obscenity law entitled "An Act to Amend an Act Concerning Offenses Against Decency, Morality and Humanity." See dissenting opinion in *Tileston* vs. *Ullman*, 129 Conn. 84, 98. Presumably the statute is intended to promote the public welfare by restricting immoral practices. The only specific immoral behavior suggested by the Supreme Court of Errors of Connecticut is the prevention of illicit relations on the theory that the free availability and use of contraceptives would encourage promiscuity. *State* vs. *Nelson*, 126 Conn. 412, 425. This argument fails because these laws do not prevent the sale or

use of devices for the prevention of disease. See *Commonwealth* vs. *Corbit*, 307 Mass. 1, 29 N. E. 2d 151; *Commonwealth* vs. *Werlinsky*, 307 Mass. 608, 29 N. E. 2d 150, cited with apparent approval in *Tileston* vs. *Ullman*, 129 Conn. 84, 91. Nor are contraceptives subject to seizure by the State. *State* vs. *Certain Contraceptive Materials*, 126 Conn. 428. Due process requires that "the means adopted shall have a real and substantial relation to the object sought to be obtained." *Nebbia* vs. *New York*, 291 U. S. 502, 525. Since the same devices which prevent the transmission of venereal disease as a result of intercourse also prevent conception, the law does not and cannot accomplish its purpose.

POINT III

Sections 53-32 and 54-196, General Statutes of Connecticut, Revision of 1958, are unconstitutional on their face and particularly as applied to all these appellants in that they are not reasonably restricted to the evil which they are intended to abate.

In *Butler* vs. *Michigan*, 352 U. S. 380, this Court held unconstitutional a statute prohibiting the sale of printed matter, pictures, etc., "manifestly tending to the corruption of the morals of youth" because it was interpreted as preventing the sale of such matter to adults who would be immune to their corrupting influence. The statute was too broad. It reduced the reading matter of adults to that which was fit for children.

In this case the statutes also "burn down the house to roast the pig." They prohibit to married persons practices not only harmless to them but highly useful if not necessary to maintain life, health and marital happiness, in order to prevent unmarried persons from engaging in such practices which as to them would be illegal and corrupting.

It requires little imagination to conceive of reasonable methods for accomplishing the apparent purpose of these statutes, i.e. mak-

ing contraceptive devices unavailable to unmarried persons. Indeed, since they are in effect now available to such persons, far more effective methods are readily suggested, as for example, prohibiting the sale of contraceptive devices except on prescription by a physician and prohibiting such prescription except to married persons. If it be argued that unmarried persons may misrepresent themselves as married, at least one answer is that such persons may and notoriously do make similar misrepresentations to hotels when registering for rooms. But no one would defend the constitutionality of a law which abolished hotels for the avowed purpose of preventing fornication and adultery. A far less unreasonable law although patently one causing inconvenience could require the display of a marriage certificate as a passport to a hotel room. The same type of law could apply to a physician's prescription.

POINT IV

The Connecticut statutes are unconstitutional on their face and particularly as applied to all appellants in that they unreasonably prohibit the more desirable, effective and reliable methods for the prevention of conception but permit the use of the more undesirable, ineffective and unreliable methods.

Numerous studies have demonstrated the superiority of the vaginal diaphragm and condom over other methods of preventing conception. For example, Guttmacher, Tietze and Rubin found a failure of contraception in 14 per cent of the cases studied by couples relying on the condom, 17.2 per cent by those employing the diaphragm and 48 per cent by persons employing all other methods.[1]

The most recent study was made by the Office of Population Research of Princeton University under the auspices of the Mil-

[1] *Journal of American Medical Association*, Vol. 140, p. 1265.

Bank Memorial Fund. It discloses pregnancy rates per 100 years of exposure for the most widely used methods as follows:[2]

Condom	14
Diaphragm	14
Rhythm	38
Douche	41

Guttmacher in a poll of 3,381 physicians found the following results as to patient acceptability, trustworthiness and prescription by them.

Reliability and Acceptability of Methods Prescribed[3]

Method	Percentage of Doctors Indicating Technique As First Choice For		
	Prescription	Reliability	Acceptability
No. of doctors indicating one or more techniques	2,516	2,726	2,739
	Percent		
Diaphragm and jelly or cream	69.6	62.1	67.4
Condom	9.5	14.1	6.4
Rhythm	4.7	1.4	4.7
Condom and jelly or cream	3.7	7.7	4.3
Jelly or cream alone	3.5	1.5	6.5
Cervical cap	2.3	1.8	2.2
Abstinence	1.5	8.0	1.2
Douches	2.4	0.8	2.0
Intracervical stem pessary	1.3	2.2	1.4
Foam Powder and Sponge	0.4	0.1	0.2
Suppositories	0.6	0.1	0.8
Withdrawal	0.7	0.3	0.2

[2] This study has not yet been officially published. The data quoted, however, was released to Dr. Tietze and included in his recent monograph, *The Condom as a Contraceptive*, Publication No. 5, National Committee on Maternal Health, p. 36 (1960).

[3] *Human Fertility*, Vol. 12, No. 1 (March, 1947).

If it is argued as it was in the opinion below (156 A.2d 514, citing *Tileston* vs. *Ullman*, 129 Conn. 92, 26 A.2d 586), that total abstinence is the one sure way to prevent conception it should be enough to state that it is common knowledge that for all societies in all ages it has not worked. One can hardly expect anything good to come from a fallacy so patent. It is simply too much to ask young married people deeply in love to abstain from marital relations for extended periods of time. Moreover such abstinence is well understood by psychiatry to impair the mental health of the parties and to discourage the development of a full and happy family life. Fifteen years ago Dr. Karl Menninger wrote: "The impulse for sexual union travels a long complicated path and becomes entwined, as Havelock Ellis says 'with all the highest and subtlest human emotions and activities' . . . The thwarting of this means the interference with the harmony of human affection which law, religion and social custom take at such pains to nature. Denied it, the suppressed energies become diffused, distorted and capable of pathological expression."[4]

In addition to being highly undependable, *coitus interruptus* is definitely harmful. Freud blamed much neurotic disorder of women on the practice.[5] To a lesser extent other methods may create anxiety because of their fallibility, or by the fact that their effective use depends on the cooperation of the husband. None of these less satisfactory means of contraception is in fact withheld from the public by the Connecticut statute. It is only the safest, the least anxiety-provoking and most aesthetic, the diaphragm and condom, which are effectively interfered with.

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[4] *Psychiatric Aspects of Contraception*, Bulletin of the Menninger Clinic, Vol. 7, p. 30. To the same effect see Otto Fenichel, *The Psychoanalytic Theory of Neurosis*, p. 455 (1945) and Karen Horney, *The Neurotic Personality of Our Times*, pp. 158-159 (1937).

[5] *Collected Papers*, Vol. I, pp. 88, 147, 217 (London, 1950).

It seems clear that while no method of contraception has yet been devised which is foolproof, those depending upon the fickle cooperation of nature are the least reliable.

POINT V

The statutes are unconstitutional on their face and particularly as applied to these appellants in that the hardship on them and the injurious social consequences of these laws so far outweigh any real or fancied benefits as to constitute an invasion of life and liberty without due process of law.

A

The Supposed Advantages of These Laws.

1. The only specific advantage relied upon by the Supreme Court of Errors is that the statutes prevent meretricious relations between the sexes. That they do not and cannot accomplish this purpose has been demonstrated under Point II.

2. It is nowhere expressed either in the legislative history of these laws nor in the judicial interpretation thereof that intercourse between spouses for the sole purpose of expressing mutual love and affection is immoral. But assuming that it is the purpose of the laws to prevent intercourse between married persons otherwise than for propagation as immoral, it is submitted that such purpose is constitutionally untenable. Unless morality is to be determined by *a priori* reasoning from preconceived premises, there must be some kind of pragmatic test by which presumed legislative findings and purposes are to be appraised. Surely the Constitution, conceived for the guidance and the protection of human beings, is not to be interpreted in a vacuum.

This Court has laid down a standard for determining the morality of human behavior in the opinion by Mr. Justice Brennan in

Roth vs. *United States*, 354 U. S. 476. The obscene character of a publication is to be determined by its appeal to prurient interest, applying "contemporary community standards." The publication or distribution of obscene matter is one form of immoral behavior. No reason is to be perceived why a different standard should be applied as a test for other immoral practices. Indeed, Mr. Justice Holmes anticipated such a test almost 50 years ago in *Noble State Bank* vs. *Haskell*, 219 U. S. 104, 111: "It [the police power] may be put forth in aid of what is sanctioned by usage or held by the prevailing morality or strong preponderant opinion to be greatly and immediately necessary to the public welfare." If this standard is applied to the practices of contraception proscribed by the Connecticut statutes, it will be seen that the overwhelming majority of the community regards them as desirable, decent and moral. Substantial segments in our society regard them not only consistent with the highest standards of morality but as required by religious faith.

In a recent survey by Freedman, Whelpton and Campbell[6] all population groups "accept the idea of couples deliberately regulating the number and spacing of their children in relation to their needs and resources." Less than 5 per cent expressed unqualified disapproval. Even among Roman Catholic wives only 13 per cent avowed such sentiments. "In our sample," they said (*ibid.* 52) "83 per cent of the fecund couples (those who find that they can have children easily) had adopted contraception; 7 per cent more planned to do so after having one or more children they still wanted. We think that the proportion may actually exceed 90 per cent, because many couples who are indifferent or opposed to contraception in early married life adopt some method when confronted with a rapidly growing family." As to unqualified approval by religious groups, the authors conclude that "most Protestants and a great majority of Jews but a minority

[6] *Scientific American*, April, 1959, pp. 50 ff.

of Catholics" take such a position (*ibid.* 54). The Catholic minority, however, was substantial (35 per cent) and the Protestant majority definite (73 per cent).

In a survey by the Harvard Crimson of Harvard and Radcliffe students,[7] the results showed that only 7 per cent disapproved birth control (no qualification appeared in the question).

The results of a recent Gallup poll disclosed that 72 per cent of the persons interviewed believed that contraceptive advice should be available to all who desired it; 14 per cent had no opinion; the other 14 per cent believed otherwise.[8]

The 171st General Assembly of the United Presbyterian Church of the U. S. A. held in June, 1959, in Indianapolis adopted a resolution declaring that the "sexual life" of a christian marriage is "given by God for the benefit of his children and is neither an ethically neutral aspect of human existence nor an evil which needs to be justified by something else, as for example, by the procreation of children." The resolution further declared that the proper use of "medically approved contraceptives may contribute to the spiritual, emotional and economic welfare of the family."[9]

The Lambeth Conference, 1958 (Church of England and Episcopal Churches of the World) adopted the following resolution: "The Conference believes that the responsibility for deciding upon the number and frequency of children has been laid by God upon the consciences of parents everywhere; that this planning, in ways that are mutually acceptable to husband and wife in Christian conscience is a right and important factor in Christian family life and should be the result of positive choice before God. Such

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[7] *Time Magazine*, June 22, 1959, p. 56.

[8] Reported in the New York *Herald-Tribune*, Feb. 18, 1960.

[9] *Time Magazine*, June 8, 1959.

responsible parenthood, built on obedience to all the duties of marriage, requires a wise stewardship of the resources and abilities of the family as well as a thoughtful consideration of the varying population needs and problems of society and the claims of future generations."[10]

At its 95th Synod in Los Angeles, 1954, the Augustana Lutheran Church unanimously adopted the following resolution:

> "5. The means which a married pair uses to determine the numbers and spacing of the births of their children are a matter for them to decide with their own consciences, on the basis of competent medical advice and in a sense of accountability to God.
>
> "6. So long as it causes no harm to those involved, either immediately or over an extended period, none of the methods for controlling the number and spacing of the birth of children has any special moral merit or demerit."[11]

The United Lutheran Church, at its 20th Biennial Convention resolved that "Choice as to means of conception control should be made upon professional medical advice."

Although the theological position of the Roman Catholic Church prohibits the practice of contraception by "artificial" means to members of the faith, there is eminent Catholic authority that it is morally wrong to enforce by law this dogma upon persons whose religious and ethical convictions are the other way. Thus, Vernon J. Bourke, a distinguished philosopher has recently written:[12]

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[10] *Report of the Lambeth Conference*, 1958, S.P.C.K. and Seabury Press, London and Greenwich, Conn., No. 115, p. 157.

[11] *Report of the Ninety-fifth Synod* (D. Verner, ed.), pp. 229-232 (1954).

[12] Moral Problems in Censoring, 40 *Marquette L. Rev.* 57, 68 (1956). See also John Courtney Murray, *Religion in America* (John Cogley, ed.), pp. 32-33 (1959).

"Are Catholics, living as citizens of a democratic country, justified in seeking government restraint of the dissemination of information on birth-control practices? Before examining this, let us remember that we are talking about a pluralistic society, a society in which there are diverse views on the moral value of birth-control data . . .

"Remembering that these conflicts arise because of varying notions of what is morally acceptable, I think we may say three things about them. First, each minority group has a right, even with a large pluralistic society, to censor *for its own members* the use of media seriously considered harmful for that group. Secondly, one minority group in a pluralistic society does not have a moral right to demand government censoring of the expression of the foregoing sort of information *for members of other groups*, who do not share the same standards . . ."

If morally wrong, it is difficult to sustain the validity of these laws as reasonable restrictions upon personal liberty.

It would seem obvious that if a law prohibiting control of births by scientific means is to be judged by "contemporary community standards," these Connecticut laws are beyond the power of state legislatures which enforce upon all married people the limitations approved by a small minority of the public and an infinitesimal minority of the medical profession.

In fact, the medical profession overwhelmingly approves the use of contraceptives proscribed by the Connecticut law. In a poll taken in 1947 by a distinguished physician, it appeared that 97.8 per cent of American doctors approved contraception as a medical technique.[18] Some twenty-odd years ago the House of Delegates of the American Medical Association adopted a Com-

[18]Guttmacher, *Conception Control and the Medical Profession*, *Human Fertility*, March, 1947, and see Pilpel, The Legal Status of Contraception, *North Carolina L. Rev.*, April, 1944.

mittee Report recommending that medical students "be instructed fully concerning fertility and sterility and taught the clinical considerations and therapeutic applications of contraceptive methods."[14]

B

The Injurious Effects of This Legislation On These Appellants and Society.

1. These laws are a colossal irrelevancy to any proper concern of the legislature of the state of Connecticut. They regulate intimate and personal relations between spouses. When the long arm of the law reaches into the bedroom and regulates the most sacred relations between a man and his wife, it is going too far. There must be a limit to the extent to which the moral scruples of a minority, or for that matter of a majority, can be enacted into laws which regulate the sex life of all married people.

Appellants are not contending that their rights of privacy, as such, are directly protected by the Fourteenth Amendment. They do submit, however, that their privacy is mercilessly invaded by these laws and that, this being so, it is an highly important factor for this Court to consider in weighing the hardship upon individuals against the theoretical, if not entirely fictitious, advantages of the laws as promoting public morality. This Court has never regarded the question of reasonableness as an abstract problem. It is one to be considered in the light of the facts of life in our culture. If there is one social fact of our society which is undeniable, it is that the normal and voluntary relations of spouses in the privacy of their homes is regarded as beyond the prying eyes of peeping Toms, be they police officers or legislators.

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[14] *Journal of the American Medical Association*, Vol. 108, p. 2217 (1937).

In the Capitol Transit case (*Public Utilities Commission* vs. *Pollak*, 343 U. S. 451) this Court declined to protect the privacy of 3 per cent of the people who ride the Washington buses against annoying radio programs. By riding in a public vehicle, they forfeited protection which they otherwise might have claimed. Their privacy was "substantially limited by the rights of others" (76.3 per cent of the travelling public favored the programs). It was held that the appellants' position "wrongly assumes that the Fifth Amendment secures to each passenger on a public vehicle regulated by the federal government a right of privacy substantially equal to the privacy to which he is entitled in his home."

These appellants complain that it is precisely their privacy in their homes and, indeed, in the most private part thereof that is invaded. They want to be let alone in the bedroom. They insist that marital intercourse may not be rationed, censored or regulated by priest, legislator or bureaucrat. Certainly, they contend, the "liberty" guaranteed by the due process clause includes this, among the most sacred experiences of life. The decision in the *Capitol Transit* case may well have been different if 76.3 per cent of the travellers objected to the programs. In this case it is to be observed that an overwhelming majority of persons favor conception control, most of them, without qualification. In any event, it is to be stressed that unlike the *Capitol Transit* situation, the claimed rights of the majority here in no way collides with the rights of the minority who disavow some, but not all, methods of control of births.

The contention of these appellants is that their right to use contraceptive devices is beyond the reach of a law which, at most, has highly dubious claims to the promotion of public morality, in that (1) it concerns only the spouses themselves, (2) it takes place in the privacy of their homes, (3) it is not only harmless to them but according to the all but unanimous medical opinion it is necessary to preserve life in some cases, health and familial

happiness in others and is in accord with scientific judgment as to necessary population control to promote the welfare of mankind generally.

In other words, these married persons contend that they have a constitutional right to marital intercourse in the privacy of their homes under medically approved conditions and under circumstances mutually satisfactory to them. What right, it may be asked, is more fundamental or more sacred?

2. These laws result in unwanted children.

Certainly among the most unfortunate of children are those brought into life unwanted by their parents. Their unhappiness is not because their stars are bad nor because their parents are bad. It is their lot to be the result of accidents and these laws make every fertile married couple in the state of Connecticut accident prone. The question presented here is how such laws can be held anything but unreasonable.

The unwanted child is of serious concern to psychiatrists. Karl Menninger makes much of this.[15] He says: "We must admit that sometimes even the unplanned-for, unwanted, unexpected child may stimulate enough love in the parents to overcome their initial hostility toward him . . . ." But often the parents are unable to suppress or repress their hostile feelings completely. They may fool themselves and others, but they do not fool the child. The child senses that he is not wanted, and the joy and promise of his life are blasted from the very start by this realization, dim and unverbalized though it may be."

"Blessed are the little children" is a beautiful sentiment. As a sociological propostion in today's world, it is often a figure of speech and should not be mistaken for a fact. Some children are blessed, indeed, but the unwanted child is not one of them.

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[15] *Love Against Hate*, pp. 223-225 (1942).

3. These laws impair and restrict the right of spouses to plan their family in a way calculated to obtain the optima advantages of family life.

Although this Court has declared that the term "liberty" includes, among other things, "the right of individuals to acquire useful knowledge, marry, establish a home and bring up children." (*Meyer* vs. *Nebraska*, 262 U. S. 390, 400), many young couples can plan neither their families nor their lives in the face of these Connecticut laws. Consider, for example, a student in a professional school, and his wife a graduate student in the university.[16] They are largely supported by his salary as a part-time instructor in the undergraduate school. They desire to plan their children both as to time and number. A pregnancy at this time would disrupt the wife's education, and seriously increase the economic problems of the couple who desire to limit their children to the point where they can give them the advantages of a good home and education. Moreover, they are convinced that spacing of their children is essential to the health of the wife. The Gutmacher poll of 3,381 doctors[17] indicated the minimum safe interval, so far as the mother's health was concerned, was twenty-

[16] The bulletins of Yale University disclose that during the academic year 1958-1959 there were 1,372 graduate and professional married students enrolled.

[17] *Human Fertility*, Vol. 12, No. 1 (March, 1947).

three months between children. This was the average. The following table summarizes the results:

Replies to the Question Concerning the Desirable Interval Between the Termination of One Pregnancy and the Beginning of the Next After a Viable Birth

Average Interval	No. of Respondents	Per Cent
Any time	6	0.2
1-3 months	129	3.8
4-6 months	295	8.7
7-9 months	197	5.8
10-12 months	885	26.2
13-18 months	714	21.1
19-24 months	699	20.7
25-36 months	111	3.3
37-48 months	5	0.1
49 months and over	1	0.0
Don't know	23	0.7
Not stated	216	6.3
Total	3,281	99.9

Years ago, it was demonstrated that even among healthy mothers, as the period of time between births decreases, the chances for the survival of each subsequent child, as well as that of the mother, decreases.[18]

The Connecticut statutes here in question deprive such young people of the liberty assured to them by the 14th Amendment of the Constitution of the United States. Certainly that renascence of ideas which brought a recognition of the importance of the individual should afford protection in the management of their family affairs within the framework of the marital relation as

[18] Bromley, *Birth Control, Its Use and Misuse*, pp. 20 ff. (1934); *Childrens Bureau Publication No. 142, Causal Factor in Infant Mortality* (1940).

it is known in the Christian and Judaic culture of the Western world. It would seem clear that if state legislation made it a criminal offense for any married couple to have, say, more than two children, this Court would strike it down as interfering with rights so deeply rooted in our culture and our law as to be a denial of due process. It is submitted that legislation which prohibits a married couple from limiting and spacing the number of their children by the most effective, scientifically approved methods, is no less an invasion of liberty which is intolerable.

It may, indeed, be true that if present population trends continue our society may, for mere survival, be compelled to find constitutional means to restrict the number of births by the most effective means possible. One way calculated to bring about such a tragic situation is to prohibit by law voluntary limitation on the birth of children.

4 These laws encourage abortion, illegal as well as therapeutic. It is argued that these laws can be justified as in the interest of public morality. The best scientific opinion is that they contribute to public immorality by the creation of situations leading to illegal abortion. Here again there is no substantial relation between the legislation and the desired end. It encourages more evil than it averts.

Because of the absence of satisfactory studies of the subject, a recent conference on abortion in the United States, held at Arden House under the auspices of the Planned Parenthood Federation, was unable to reach any clear conclusion as to the relationship of birth control education to abortion. Many of the experts present, however, felt that their clinical observations justified an impression that the abortion rate could be reduced by more widespread use of contraception. The final cautious conclusion of the conference on this question was: "It was recognized by the Conference participants that no scientific evidence has been devel-

oped to support the claim that increased availability of contraceptive services will clearly result in a decreased illegal abortion rate. The absence of such evidence, however, does not rule out the theoretical likelihood that it does. Therefore, it would be a constructive step if facilities for obtaining advice on contraception should be extended under medical supervision, to make such advice freely available to all who desire it."[19]

Some more positive statements of opinion on the subject: Dr. Sophia J. Kleegman, Clinical Professor of Obstetrics and Gynecology, N. Y. U. College of Medicine: "Education in conception control, during the premarital and postpartum medical examination is the most effective step to be advocated for preventing both therapeutic and criminal abortion . . . . Modern methods of family planning, it should be emphasized, would prevent 90-95% of all abortion deaths."[20] Dr. Kleegman also says: "For many years, whenever I was on service, I have interviewed every patient who had a therapeutic abortion. Most of them had been under the care of some health or welfare agency for years. Only one of these had ever been referred to a contraceptive clinic by a social worker. I know, in my private practice, when patients have this medical care when needed, there is a definite reduction in the number of legal or illegal abortions subsequently sought and received." She also says that in her private practice she often persuades patients not to seek illegal abortions, promising them birth control instruction later to prevent further unwanted pregnancies. "It is this promise that is the greatest help in persuading many a woman to continue a pregnancy that she would not otherwise carry on."[21]

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[19]Calderone, *Abortion in the United States*, p. 182 (1958).

[20]Kleegman, Sophia, *Planned Parenthood. Its Influence on Public Health and Family Welfare*, in Rosen, Harold, ed., *Therapeutic Abortion*, p. 254 (1954).

[21]Calderone, *op. cit.* pp. 111-113.

The late Dr. Abraham Stone, one time Vice President, Planned Parenthood Federation of America: "I believe that there is a high correlation between the lack of use of contraception and the high incidence of abortion; the more contraception is used, the less abortion there will be. While I do not have the figures here; I know from the more than 140,000 couples that have come to the Margaret Sanger Research Bureau that those who have come early in marriage and obtained competent contraceptive information have had definitely fewer abortions than those who have not used any contraceptive measures at all."[22]

5. These laws expose married women and their husbands to serious hazards of death and physical and mental illness.

The statutes forbidding contraceptive medical advice and the use of contraceptive devices constitute an unreasonable infringement of the liberty of these married people not only generally but also because of the risk to life and health which will result from further pregnancies.

In *Tileston* vs. *Ullman*, *supra* at 586, the Connecticut court said:

> "The claim of the state on this point comes down, then, to a consideration whether abstinence from intercourse is a reasonable and practical method of preventing the unfortunate consequences. Certainly it is a sure remedy. Do the frailties of human nature and the uncertainties of human passions render it impracticable? This is a question for the legislature and we cannot say it could not believe that the husband and wife would and should refrain when they both know that intercourse would very likely result in a pregnancy which might bring about the death of the wife.
>
> "The legislature is the final forum."

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[22] *Ibid.*, p. 159.

But the legislature is the final forum only so far as concerns the choice of reasonable alternatives and the overwhelming verdict of medical science is that abstinence is neither reasonable nor practical because normally sexed persons the age of these appellants cannot abstain for extended periods without the development of anxiety neuroses or the impairment of the marriage relation. And, although the Connecticut court mentioned only abstinence as an alternative, there are others. It is submitted, however, that they are all unreasonable.

Sterilization. This is unreasonable because persons such as the Poe appellants may, if adequate diagnosis and treatment are obtained, at some future time be capable of having normal children. But sterilization is irrevocable—like the unwanted child.[29]

Abortion. This is unreasonable because if for no other reason, in the case of appellant Doe, the termination of a pregnancy could create a risk greater than that of the birth of a child. Her physicians abandoned their plan to terminate her last pregnancy for this reason after the cerebral hemorrhage.

Divorce. It can hardly be supposed that any one would seriously contend that a reasonable way for a woman in love with her husband to avoid pregnancy would be to obtain a divorce—assuming that it could be lawfully obtained.

Permitted practices to prevent conception. Practices such as the rhythm system, the use of the douche, *coitus interruptus* and absolute abstinence are all so unreliable that the risk involved is unreasonable for women whose life or health would be imperilled by pregnancy. Moreover, as shown elsewhere, in many instances these practices themselves threaten the mental health of both spouses.

The Guttmacher poll of 3,381 physicians with respect to medical indications for conception control gave the following results:[23]

Number and Percent of Physicians Approving Conception Control for the Different Indications

Indication	Number		Per Cent	
	Yes	No	Yes	No
Cardiac	3,002	379	88.8	11.2
Pulmonary disease	2,925	456	86.5	13.5
Renal disease	2,840	541	84.0	16.0
Nervous and mental disease	2,823	558	83.5	16.5
Great multiparity	2,691	690	79.6	20.4
Hypertension	2,678	703	79.2	20.8
Diabetes	2,571	810	76.0	24.0
Exopthalmic goitre	2,494	887	73.8	26.2
Prevention of inherited disease or malformations	2,447	934	72.4	27.6
Recent pelvic operation	2,419	962	71.5	28.5
General debility and anemia	2,349	1,032	69.5	30.5
Venereal disease	2,230	1,151	66.0	34.0

It thus seems clear that there are no reasonable alternatives to the use of the forbidden contraceptive devices for the women whose life and health will be put in jeopardy by another pregnancy. In other words, the laws of the State permit these appellants to try to preserve their lives and health—only by the methods least likely to succeed.

But in cases where life is in jeopardy even a reasonable alternative may not save an otherwise unconstitutional act. Thus in *England* vs. *Louisiana State Board of Medical Examiners*, 259 F. 2d 626 (1958) the court said: "Under all the cases we think it is that the State cannot deny to any individual the right to exercise a reasonable choice in the method of treatment of his

[23] *Human Fertility*, Vol. 12, No. 1, March, 1947.

ills . . . ." Certainly it cannot be contended that a young woman for whom another pregnancy involves a serious threat of death adopts an unreasonable choice of treatment when, on her physician's advice, she turns to the forbidden contraceptives.

Although it may not be true in all societies, certainly human life is among the highest of values in our culture. Even with us, a few stalwart patriots may put the alternatives as liberty or death, but the average citizen prizes his life above his liberty and certainly above his property. It would seem self-evident that life is not to be equated with property in the application of the due process clause of the Constitution. Thus legislation which threatens life will require far more to justify it than that which involves property. A more realistic classification would include life with those First Amendment rights which receive the highest protection known to our system of law: the rights to think, speak and freely practice religion.

We do not invoke the phrase "preferred position" of First Amendment guarantees insofar as that phrase may be equated with a presumption of unconstitutionality. We do not argue that there exists such a presumption. At the same time we think it can be maintained, both on the basis of decisions of this Court as well as the language used, that the application of the doctrine of reasonableness to statutes limiting speech and religious practices may produce quite different results than when used in connection with other due process problems. For example, the purpose of keeping the streets clean is insufficient to justify an ordinance prohibiting the distribution of religious literature (*Schneider* vs. *New Jersey*, 308 U. S. 147), although it may be adequate when all that is involved is the distribution of handbills advertising a prize fight or a street carnival. See *Breard* vs. *Alexandria*, 341 U. S. 622.

The standard may well be the same for judging legislation threatening life or making inroads on personal liberty on the one hand and economic freedom on the other. But legislative curtailment of freedom of the market place and the right to acquire and use property may be justified to avert evils which reasonable men would find altogether inadequate in the case of abridgment of speech, the prohibition of the free practice of religion or a serious threat to life itself. In other words, although there may be a presumption of constitutionality of statutes directed at those rights enshrined in the First Amendment and where human life is involved, it is submitted that the burden of overcoming the presumption is far less onerous than in the case of other restrictions. The curtailment in the former situation may be intolerable, whereas reasonable people would regard the price not too high in a situation involving only money.

CONCLUSION

The issues in these cases are fundamental and touch the most delicate aspects of the private lives of these appellants in particular and the people of Connecticut in general. They involve the most intimate relation of married persons; they involve the lives and health of married women and the emotional stability of their husbands; they thus involve the welfare of future generations; they involve the economic and social welfare of the entire community; and it is submitted they involve the Constitution of the United States in that the laws in question are invalid under the Fourteenth Amendment thereto.

Respectfully submitted,

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127 Wall Street
New Haven, Conn.

APPENDIX

Supreme Court of Errors

OCTOBER TERM, 1959

PAUL POE ET AL.

Appellants

v.

ABRAHAM S. ULLMAN, *State's Attorney*,

Appellee

JANE DOE

Appellant

v.

ABRAHAM S. ULLMAN, *State's Attorney*,

Appellee

Actions for declaratory judgments determining the constitutionality of legislation forbidding the use and prescription of contraceptive devices, brought to the Superior Court in New Haven County, where demurrers to the complaints were sustained, *Healey, J.*, and, the plaintiff failing to plead further, judgments were rendered in favor of the defendant, from which the plaintiffs appealed. *No error.*

Catherine G. Roraback, for the appellants (plaintiffs).

Raymond J. Cannon, assistant attorney general, with whom, on the brief, was *Albert L. Coles*, attorney general, for the appellee (defendant) in each case.

BALDWIN, C. J. The complaints in these four actions seek declaratory judgments as to the constitutionality of § 53-32 of the General Statutes, prohibiting the use of any drug, medicinal article or instrument for the purpose of preventing conception, and

§ 54-196, prohibiting the counseling or abetting of such use.[1] The plaintiff C. Lee Buxton is a licensed physician. The plaintiff Jane Doe is a married woman living with her husband. The plaintiffs Paul and Pauline Poe, as well as the plaintiffs Harold and Hanna Hoe, are husband and wife. Except for Dr. Buxton, all the plaintiffs are using, for the purpose of this litigation, fictitious names. They are patients of Dr. Buxton. The plaintiffs claim that the two statutes deprive them of rights guaranteed by the fourteenth amendment to the federal constitution. The defendant demurred to all the complaints; among his grounds were that the plaintiffs were seeking declaratory judgments on legal issues already conclusively determined by this court and that the passage of time and a change in the personnel of the court would not justify a reversal of these determinations. The trial court sustained the demurrers on these grounds, and the plaintiffs have appealed.

A demurrer to a complaint for a declaratory judgment is proper when the facts alleged do not bring the case within the scope of the statute and rules relating to declaratory judgments. General Statute §52-29; Practice Book § 277; *Hill* v. *Wright*, 128 Conn. 12, 15, 20 A.2d 388; Maltbie, Conn. App. Proc. § 227; see *Glens Falls Ins. Co.* v. *Somers*, 146 Conn. 708, 713, A.2d . If the rights and jural relations of parties in the situation of these plaintiffs have been conclusively determined by previous decision of this court, the demurrers were properly sustained upon the grounds stated.

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[1] Sec. 53-32. *Use of drugs or instruments to prevent conception.* "Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned."

Sec. 54-196. *Accessories.* "Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender."

Twice in the recent past this court has passed upon questions of interpretation and constitutionality of what are presently §§ 53-32 and 54-196. *State* v. *Nelson*, 126 Conn. 412, 11 A.2d 856, decided March 6, 1940, held that there was no ambiguity in the wording of the statutes which made the legislative intent uncertain so as to permit a construction which allowed an exception in favor of a duly licensed physician who prescribes the use of contraceptive measures to a patient who is a married woman when, in his professional opinion, her general health and well-being necessitate it. We said (p. 417): "Any intention on the part of the Legislature to allow [the exception claimed] is negatived not only by the absolute language used originally and preserved ever since but also, signally, by [the legislature's] repeated and recent refusals to inject an exception." We held, also (p. 422), that the statute was a valid exercise of the police power. We pointed out (p. 418) that the particular facts alleged in the information confined the issues to situations where, in the opinion of the physician, " 'the general health' of a married woman requires the use of contraceptives." We said that there was, therefore, "no occasion to determine whether an implied exception might be recognized when 'pregnancy would jeopardize life' . . . similar to that usually expressly made in statutes concerning abortion." See General Statutes §53-29.

In *Tileston* v. *Ullman*, 129 Conn. 84, 26 A.2d 582, decided May 22, 1942, the plaintiff, a licensed physician, brought an action for a declaratory judgment to determine whether the statutes forbade him from prescribing the use of contraceptives for a married woman in cases where a pregnancy would endanger her life or health and, if the statutes did, whether they were constitutional. This presented the issue which we specifically said was not before us in the *Nelson* case. We held in the *Tileston* case that, in the light of the legislative history of the statutes and the repeated and recent refusals of the legislature to inject any exception, the statutes could not be construed to allow the exception claimed, and that they were constitutional.

It is claimed that the facts in the cases at bar present an entirely different situation with respect to the rights of the plaintiffs from that presented in the *Nelson* and *Tileston* cases. In Buxton v. Ullman, the complaint alleges, in substance, and the demurrer admits, thatt he plaintiff, a licensed physician, has a patient, Jane Doe, a married woman twenty-five years of age, living with her husband. She had been admitted to the obstetrical service of the hospital where the plaintiff, an eminently qualified obstetrician and gynecologist, was in charge. She was three and one-half months pregnant and developed a condition which brought her to the very brink of death. Her physical condition is now such that conception and another pregnancy would be exceedingly dangerous to her life. She needs and requires advice as to what preventive measures can be taken to avert a recurrence of the experience she suffered. She claims a right to live a normal married life with her husband. She has asked the plaintiff for medical advice, and he has knowledge of drugs, medicinal articles and instruments which could be used by her to prevent conception and avoid the serious consequences of another pregnancy. In a companion case, Doe v. Ullman, the plaintiff is the patient described in the Buxton case, and she alleges, in substance, the same facts as are alleged in the Buxton complaint. In another companion case the complaint alleges, in substance, that the plaintiffs, Paul and Pauline Poe, are a married couple who have consulted Dr. Buxton. Mrs. Poe, who is twenty-six years old and living with her husband, has borne three abnormal children, no one of whom lived more than ten weeks. The basic cause of these abnormalities is thought by Dr. Buxton and other qualified medical specialists to be genetic, but the prognosis is very uncertain and renders the prospect of another pregnancy extremely disturbing to both Mr. and Mrs. Poe. In still another case the plaintiffs, Harold and Hanna Hoe, aged twenty-nine and twenty-six years, respectively, husband and wife, have no living children. Mrs. Hoe has been delivered of four children. Owing to the blood groupings of these plaintiffs, Mrs. Hoe's blood being Rh negative and Mr.

Hoe's Rh positive, the prospects that they can procreate a normal child is highly unlikely.

The plaintiff Buxton has knowledge of drugs, medicinal articles and instrumentalities which could be safely used to prevent conception and avert the dire consequences which have followed conception and pregnancy in the women plaintiffs, who desire to live normal married lives with their husbands. If the plaintiff Buxton, on one hand, applies this knowledge by advising these married people as to available contraceptive measures, and if, on the other hand, these married people accept and follow his advice, the statutes would be violated by all the plaintiffs. It is conceded by the demurrers that the use of contraceptives is, according to medical science, the best and safest preventive measure for the plaintiffs to follow in order to avoid pregnancy.

The plaintiffs claim that these facts raise issues not raised in the *Nelson* and *Tileston* cases. The plaintiff Buxton asserts that he has a constitutional right, distinct from that of his patients to practice his profession free from unreasonable restraint and to advise and prescribe the use of drugs, medicinal articles and instrumentalities which he believes it to be his professional obligation to prescribe. The facts in the Buxton case differ from those in the *Tileston* case in that here the plaintiff, a physician, is asserting an alleged constitutional right of his own rather than an alleged constitutional right of a patient. Essentially, there is no real difference in the nature of the right. The effect of regulation of a business or profession is to curtail the activities of both the dispenser and the user of goods or services. Both are deprived of some advantage which they might otherwise have. The Doe, Poe and Hoe cases differ from the *Nelson* and *Tileston* cases in that the plaintiffs here are asserting their rights, as patients, to the benefit of a physician's prescription for the use of contraceptives which would relieve them of a dangerous threat to their health and happiness. Their right, too, is essentially the same as that of the physician. In other words, the difference between the *Tileston* and *Nelson* cases and those at bar lies only in the fact

that here each plaintiff is asserting his own constitutional right, while in the *Nelson* and *Tileston* cases the doctors were attempting to assert the right of their patients to receive treatment.

It cannot be questioned that the "state may 'regulate the relative rights and duties of all within its jurisdiction so as to guard the public morals, the public safety and the public health, as well as to promote . . . the common good.'" *State* v. *Vachon*, 140 Conn. 478, 481, 101 A.2d 509, quoting from *House* v. *Mayes*, 219 U. S. 270, 282, 31 S. Ct. 234, 55 L. Ed. 213. The exercise of this power is always "subject, in the courts, to the test whether it serves the public health, safety and morals at all and whether it does so in a reasonable manner." *Amsel* v. *Brooks*, 141 Conn. 288, 294, 106 A.2d 152. In our tripartite system of government, the judiciary accords to the legislature the right to determine in the first instance what is the nature and extent of the danger to the public health, safety, morals and welfare and what are the measures best calculated to meet the threat. Courts interfere with legislation enacted under the police power only when it clearly appears that the legislative measures taken do not serve the public health, safety, morals or welfare or that they deny or interfere with private rights unreasonably. *Clark* v. *Town Council*, 145 Conn. 476, 482, 144 A.2d 327; *State* v. *Gordon*, 143 Conn. 698, 703, 125 A.2d 477; *Cyphers* v. *Allyn*, 142 Conn. 699, 705, 118 A.2d 318. It was out of respect for these fundamental principles that this court in the *Nelson* and *Tileston* cases refused to so interpret the statutes as to allow an exception to cover situations of the kind presented in the cases at bar and upheld the constitutionality of the statutes.

If the plaintiffs are correct in their claims, we would be required to follow one of two courses: overrule the *Nelson* and *Tileston* decisions by construing the statutes to include the exception proposed in those cases and thus permit physicians to prescribe, and patients to use, contraceptive measures under circumstances similar to those present in the cases at bar, and by that means sustain the constitutionality of the statutes; or hold that the statute with-

out the claimed exception are unconstitutional. Since the *Tileston* decision in 1942, the General Assembly has consistently refused to amend the statutes so as to allow physicians to prescribe the use of contraceptive measures.[2] Furthermore, two complete revisions of the general statutes have been approved by the General Assembly and the statutes in question have been left unchanged. Rev. 1949, §§8568, 8875; Rev. 1958, §§53-32, 54-196. The legis-

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[2]1943 Sess. H.B. 313. *An act to establish standards for contraceptive devices and their distribution* (blank bill). Referred to committee, H. Jour. p. 194, S. Jour. p. 209; committee recommended rejection and passage of substitute, H. Jour. p. 1299; House passed substitute, H. Jour. p. 1339; Senate rejected, S. Jour. p. 1313; House adhered to former action, H. Jour. p. 1480.

1945 Sess. H.B. 317. *An act concerning the rights of physicians to prescribe for their patients* (providing for permitting of physicians to prescribe methods or means for the temporary prevention of pregnancy when necessary to save life or prevent serious injury to health). Referred to committee, H. Jour. p. 263, S. Jour. p. 257; hearing held on May 1, but bill not reported thereafter.

1947 Sess. H.B. 953. *An act concerning the rights of physicians to prescribe for their patients* (providing that physicians may prescribe for the temporary prevention of pregnancy when in the opinion of the physician, pregnancy would endanger the life or injure the health of a married woman). After receiving a favorable committee report, House passed, H. Jour. p. 733; Senate rejected, S. Jour. p. 752; House adhered to former action, H. Jour. p. 808.

1949 Sess. H.B. 1210. *An act concerning the right of licensed physicians to prescribe for married women* (providing for physicians to prescribe for the health of married women). Referred to committee, H. Jour. p. 307, S. Jour. p. 368; hearing held April 12 and May 3 (executive session) but no indication of a further report.

1951 Sess. H.B. 1483. *An act concerning the right of licensed physicians to prescribe for married women* (providing for physicians to prescribe methods or means for temporary prevention of pregnancy in a married woman when pregnancy would endanger the life or injure the health of such married woman). Referred to committee, H. Jour. p. 273, S. Jour. p. 266; hearing held April 11; bill withdrawn.

lature is presumed to be aware of the interpretation placed upon its legislation by the courts and the effect which its own nonaction thereafter may have. *Herald Publishing Co. v. Bill*, 142 Conn. 53, 63, 111 A.2d 4; *Hurlbutt v. Hathaway*, 139 Conn. 258, 263, 93 A.2d 161. Courts cannot, by the process of construction, abrogate a clear expression of legislative intent, especially when, as here, unambiguous language is fortified by the refusal of the legislature, in the light of judicial interpretation, to change it. *Watrous v. Connelly*, 141 Conn. 257, 263, 105 A.2d 654; *Herald Publishing Co. v. Bill*, supra; *Pennsylvania R. Co. v. International Coal*

S.B. 696. *An act concerning the right of licensed physicians to prescribe for married women* (providing for birth control). Referred to committee, S. Jour. p. 192, H. Jour. p. 304; hearing held April 11, but bill not reported thereafter.

H.B. 1485. (Same title and content as H.B. 483). After reference to committee by both House and Senate, House passed, H. Jour. p. 717; bill not reported from Senate committee.

1953 Sess. H.B. 1452. *An act amending an act concerning the right of licensed physicians to prescribe for married women.* After referral to committee by both the House and Senate, and after a petition was filed to get the bill out of committee, a favorable report was made. House passed, H. Jour. p. 1024; Senate recommitted, S. Jour. p. 942; no report thereafter.

1955 Sess. H.B. 1177. *An act concerning the use of drugs or instruments to prevent conception* (providing for the removal of the prohibition on physicians in the prescribing of the use of contraceptives). House passed, H. Jour. p. 949; Senate rejected, S. Jour. p. 1054.

H.B. 1182. *An act concerning the right of licensed physicians to prescribe for married women* (providing for the permitting of licensed physicians to prescribe and others to use and sell contraceptive devices). House passed, H. Jour. p. 954; Senate rejected, S. Jour. p. 1054.

1957 Sess. H.B. 572. *An act concerning the dissemination of information concerning and prescription of contraceptives to married women.* House passed, H. Jour. p. 944; Senate rejected, S. Jour. p. 867.

1959 Sess. H.B. 3497. *An act concerning prevention of conception pursuant to spiritual or medical advice.* Referred to committee, H. Jour. p. 276, S. Jour. p. 292; hearing held April 24, but bill not reported thereafter.

Mining Co., 230 U. S. 184, 198, 33 S. Ct. 893, 57 L. Ed. 1440. In short, courts cannot write legislation by judicial decree, this is particularly so when the legislature has refused to rewrite the existing legislation. The *Nelson* and *Tileston* decisions cannot be overruled by any attempt to reconstruct the statutes.

Since the injection of an exception by construction is legally impossible, can we now hold that the statutes are unconstitutional by reason of the facts in the instant cases, the claims of infringement of constitutional rights are presented more dramatically than they have ever been before. Basically, the claims are, nevertheless, essentially the same as those which this court considered in the *Nelson* and *Tileston* cases. It may well be that the use of contraceptives is indicated as the best and safest preventive measure which medical science can offer these plaintiffs. That fact does not make it absolutely necessary for the legislature to accept such a solution in all cases, where there is, as pointed out in the *Tileston* case (p. 92), another alternative, abstinence from sexual intercourse. We cannot say that the legislature, in weighing the considerations for and against an exception legalizing contraceptive measures in cases such as the ones before us, could not reasonably conclude that, despite the occasional hardship which might result, the greater good would be served by leaving the statutes as they are.

The plaintiff's argument raises an issue of public policy. Each of the separate magistracies of our government owes to the others a duty not to trespass upon the lawful domain of the others. The judiciary has a duty to test legislative action by constitutional principles, but it cannot, in that process, usurp the power of the legislature. *State* v. *Gilletto*, 98 Conn. 702, 714, 120 A. 367; *Lyman* v. *Adorno*, 133 Conn. 511, 513, 52 A.2d 702; *General Motors Corporation* v. *Maquin*, 134 Conn. 118, 132, 55 A.2d 752; *State ex rel. Higgins* v. *Civil Service Commission*, 130 Conn. 102, 111, 90 A.2d 862; *Herald Publishing Co.* v. *Bill*, supra. The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however, indirectly,

that will should be recognized and obeyed." *Van Beeck* v. *Sabine Towing Co.*, 300 U. S. 342, 351, 57 S. Ct. 452, 81 L. Ed. 685, quoting from *Johnson* v. *United States*, 163 Fed. 30, 32; *United States* v. *Cooper Corporation*, 312 U. S. 600, 606, 61 S. Ct. 742, 85 L. Ed. 1071; *Helvering* v. *Wood*, 309 U. S. 344, 347, 60 S. Ct. 551, 84 L. Ed. 796; *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 394, 60 S. Ct. 907, 84 L. Ed. 1263; *Butterworth* v. *Boyd*, 12 Cal. 2d 140, 146, 82 P.2d 434; *Collision* v. *State ex. rel. Green*, 39 Del. 460, 486, 2 A.2d 97; *McDonald* v. *Eagle Coal Co.*, 99 Mont. 309, 314, 43 P.2d 655; *Brahmey* v. *Rollins*, 87 N. H. 290, 298, 179 A. 186. We conclude that §§ 53-52 and 54-196 are a constitutional exercise of legislative power.

Although this disposes of the case, we note the claim of the defendant that in the Doe, Hoe and Poe cases the plaintiffs are obviously fictitious persons and it must necessarily follow that the questions sought to be adjudicated are academic and do not apply to any real person or persons. General Statutes § 52-89 provides, in part, that writs in civil actions shall describe the parties, presumably by their real names, so that they may be identified. Practice Book § 109 states, among other things, that "[i]n the captions of pleas, answers, etc., the parties may be described as John Doe v. Richard Roe et al., but this will not be sufficient in a judgment file which must give all the data necessary for use in drawing the execution." Because of the intimate and distressing details alleged in these complaints, it is understandable that the parties who are allegedly medical patients would wish to be anonymous. To obviate any possibility that the parties and the issues raised are fictitious and that the jurisdiction of the court is being invoked to decide moot questions, a plaintiff who desires to use a name other than his own should, before the case is presented in court, acquaint the court of his desires, establish the fact that the parties and issues are real although the names are fictitious, and secure the court's consent, as was done in these cases. The privilege of using fictitious names in actions should be

granted only in the rare case where the nature of the issue litigated and the interest of the parties demand it and no harm can be done to the public interest.

There is no error.

In this opinion the other judges concurred.

At a Supreme Court of Errors Held at Hartford on the First Tuesday of October, A. D. 1959.

Present, Hon. Raymond E. Baldwin, Chief Justice

Hon. John Hamilton King
Hon. James E. Murphy
Hon. Samuel Mellitz
Hon. William J. Shea
Associate Judges

Paul Poe and Pauline Poe, of the Town and County of New Haven, State of Connecticut

vs.

Abraham S. Ullman, of the Town of Hamden, County of New Haven, State of Connecticut, State's Attorney in and for the County of New Haven

On Appeal from the Superior Court for New Haven County at New Haven.

JUDGMENT.

This appeal by the plaintiffs claiming error in the process, record and judgment, and in the proceedings and decisions of the court on questions of law arising in the trial, as may appear in the certified transcript of record and finding of facts, on file in this court, was allowed by the Superior Court for New Haven County at New Haven, on the 11th day of February, A. D. 1959, and came to this court, at its term held at Hartford, on the first Tuesday in March, A. D. 1959, and thence by continuance

to the present term, when the parties appeared and were fully heard.

And now this court finds that in the record, judgment and proceedings of said Superior Court for New Haven County at New Haven, there is no error.

It is therefore considered and adjudged that said judgment be confirmed and established, and that the

appellee recover of the appellants his costs taxed at $87.20.

Date of judgment, December 8, 1959.

By the Court,
EDWARD HORWITZ, Clerk.

At a Supreme Court of Errors Held at Hartford on the First Tuesday of October, A. D. 1959.

Present, HON. RAYMOND E. BALDWIN, Chief Justice.

HON. JOHN HAMILTON KING
HON. JAMES E. MURPHY
HON. SAMUEL MELLITZ
HON. WILLIAM J. SHEA
} Associate Judges.

JANE DOE, of the Town and County of New Haven, State of Connecticut
vs.
ABRAHAM S. ULLMAN, of the Town of Hamden, County of New Haven, State of Connecticut, State's Attorney, in and for the County of New Haven.
} On Appeal from the Superior Court for New Haven County at New Haven.

JUDGMENT.

This appeal by the plaintiff claiming error in the process, record and judgment, and in the proceedings and decisions of the court on questions of law arising in the trial, as may appear in

the certified transcript of record and finding of facts, on file in this court, was allowed by the Superior Court for New Haven County at New Haven, on the 11th day of February, A. D. 1959, and came to this court, at its term held at Hartford, on the first Tuesday in March, A. D. 1959, and thence by continuance to the present term, when the parties appeared and were fully heard.

And now this court finds that in the record, judgment and proceedings of said Superior Court for New Haven County at New Haven, there is no error.

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appellee recover of the appellant his costs taxed at $87.20.

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By the Court,

EDWARD HORWITZ, Clerk.